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No. 06-427

In the Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION, PETITIONER

v.

BRENTWOOD ACADEMY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question:

To what extent does the First Amendment limit the government's ability to place restrictions on the speech of individuals or entities that voluntarily participate in a program administered by the government or enter into a contractual relationship with the government?

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INTEREST OF THE UNITED STATES

This case concerns the extent to which the First Amendment limits the government's ability to place restrictions on the speech of individuals or entities that voluntarily participate in a program administered by the government or enter into a contractual relationship with the government. The federal government routinely imposes restrictions on speech in those and similar contexts (for example, when it acts as property owner, educator, employer, or funder). When it does so, the government acts in a capacity other than its sovereign capacity with respect to the public at large and, as a result, a different and more deferential First Amendment inquiry governs. The First Amendment analysis employed by the court of appeals in this case overlooks that distinction and thus may affect the federal government's ability to

take permissible action in a variety of contexts. The United States therefore has a significant interest in this case.

The United States has participated as a party or amicus curiae in numerous other cases involving the application of the First Amendment when entities or individuals participate in a government program, or enter into a contractual relationship, that places restrictions on their speech, including cases addressed by the court of appeals and relied upon by petitioner here. See, *e.g.*, *Garcetti* v. *Ceballos*, 126 S. Ct. 1951 (2006); *Rumsfeld* v. *FAIR*, 126 S. Ct. 1297 (2006); *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668 (1996); *Rust* v. *Sullivan*, 500 U.S. 173 (1991); *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985); *Grove City Coll.* v. *Bell*, 465 U.S. 555 (1984); *Snepp* v. *United States*, 444 U.S. 507 (1980) (per curiam). The United States participated as amicus curiae at an earlier stage of this case on the state-action question.

STATEMENT

1. Petitioner Tennessee Secondary School Athletic Association (TSSAA) is a non-profit corporation that regulates interscholastic athletic competition among high schools in Tennessee. It is made up of 55 private schools, including respondent Brentwood Academy (Brentwood), and 290 public schools. TSSAA is governed by a legislative council, which has authority to enact regulations, and the board of control, which has authority to enforce them. This case involves one such regulation, the so-called "recruiting rule." The rule prohibits TSSAA members from using "undue influence * * * to secure or to retain a student for athletic purposes," and a non-binding interpretive commentary to the rule prohibits a coach from contacting a student or his or her parents before the student has enrolled in the school. *Brentwood Acad.* v. *TSSAA*, 531 U.S. 288, 291-293 (2001) (*Brentwood I*); Pet. App. 79a-81a; J.A. 134-139, 181-185, 274.

In the Spring of 1997, Brentwood's athletic director and football coach, Carlton Flatt, sent a letter to the families of eighth-grade boys who had signed enrollment contracts with Brentwood, but had not yet enrolled in the school, inviting the boys to participate in spring football practice. In follow-up telephone calls to the families, Flatt clarified that attendance at the practices was not mandatory. TSSAA's executive director, Ronnie Carter, notified Brentwood that those actions violated the recruiting rule and that certain other actions by the school, which are not at issue here, also violated TSSAA rules. Brentwood requested and received a hearing before Carter and members of the board of control, and then appealed to the full board. The challenges were unsuccessful, however, and the board of control penalized Brentwood for its rules violations by placing Brentwood's athletic program on probation for four years, declaring its football and boys' basketball teams ineligible for the playoffs for two years, and imposing a fine of $3000. *Brentwood I*, 531 U.S. at 293; Pet. App. 83a-86a & n.1; J.A. 119, 238-271, 275-276.

Brentwood then sued TSSAA and Carter in federal court. It alleged that, in enforcing its rules against Brentwood, TSSAA violated the First Amendment and other provisions of federal and state law. *Brentwood I*, 531 U.S. at 293; Pet. App. 86a.

2. The district court granted partial summary judgment for Brentwood. *Brentwood Acad.* v. *TSSAA*, 13 F. Supp. 2d 670 (M.D. Tenn. 1998). It held that TSSAA is a state actor subject to constitutional limitations, *id.* at 679-685, and that TSSAA's recruiting rule violates the First Amendment, both on its face and as applied, *id.* at 686-694. In finding a First Amendment violation, the court reasoned that the recruiting rule is a "content-based" regulation subject to the "most exacting scrutiny" and that TSSAA could not show that the rule serves a "compelling governmental interest" and is the "least

restrictive means" of furthering it. *Id.* at 687-691 (quoting *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 642 (1994)). The court of appeals reversed, holding that TSSAA is not a state actor. *Brentwood Acad.* v. *TSSAA*, 180 F.3d 758 (6th Cir. 1999). This Court granted certiorari, 528 U.S. 1153 (2000), and reversed the decision of the court of appeals, *Brentwood I*. The Court held that "[TSSAA's] regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association." 531 U.S. at 291.

On remand from this Court, the court of appeals again reversed the partial summary judgment for Brentwood, this time holding that the district court applied the wrong standard in finding a violation of the First Amendment. Pet. App. 1a-24a. The court of appeals held that the recruiting rule is a "content-neutral regulation" that restricts the "time, place, and manner of speech," and is therefore subject to "intermediate scrutiny." *Id.* at 14a-15a. Under that standard, the court explained, TSSAA must show that the rule promotes "substantial governmental interests" and is "narrowly tailored" to serve them. *Id.* at 21. The court of appeals remanded the case to the district court for a determination of whether those showings could be made. *Id.* at 23a. This Court denied certiorari. 535 U.S. 971 (2002).

3. On remand from the court of appeals, the district court held a bench trial, at the conclusion of which it found that the recruiting rule, as applied to Brentwood, violated the First Amendment. Pet. App. 27a-55a. The court found that the rule furthered two substantial governmental interests: keeping high school athletics subordinate to academics and protecting student athletes from exploitation. *Id.* at 48a-49a. The court held, however, that the application of the rule to Brentwood was not narrowly tailored to further those interests, because, in the court's view, Flatt's letter and follow-up

phone calls did not elevate athletics over academics or exploit students or their parents. *Id.* at 49a-55a.[1]

4. On the parties' cross-appeals, a divided court of appeals affirmed in relevant part. Pet. App. 78a-153a.

a. As an initial matter, the majority rejected TSSAA's contention that the district court should have reviewed the challenged actions more deferentially because TSSAA acts in a contractual rather than sovereign capacity with respect to Brentwood and other member schools. Pet. App. 88a-96a. The majority reasoned that TSSAA's proposed approach was inconsistent with the analytical framework described in the court of appeals' opinion on remand from this Court, *id.* at 88a-91a, and that, in any event, the cases on which TSSAA relied involved situations in which (unlike in this case) the restriction on speech was imposed upon a government employee, an independent contractor, or a recipient of public funds, *id.* at 91a-95a (discussing *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968), *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668 (1996), and *Rust* v. *Sullivan*, 500 U.S. 173 (1991)). Applying intermediate scrutiny, the court of appeals majority then affirmed the district court's First Amendment holding. *Id.* at 96a-107a.

TSSAA had proffered three interests as justification for its recruiting rule: keeping high school athletics subordinate to academics; protecting student athletes from exploitation; and fostering a level playing field among member schools. Pet. App. 97a. The majority held that the court of appeals had already recognized, in its decision on remand from this Court, that the first interest was substantial; that TSSAA had presented "voluminous evidence at trial" that the second interest

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[1] The district court also ruled, *inter alia*, that, in enforcing the recruiting rule, TSSAA violated Brentwood's substantive due process and procedural due process rights. Pet. App. 55a-71a.

was substantial; but that TSSAA had presented "no evidence" that the third interest was substantial. *Id.* at 97a-100a.

Having held that only the first two proffered governmental interests were substantial, the majority then held that the recruiting rule, as applied to Brentwood's specific conduct, was not narrowly tailored to further those interests. Pet. App. 100a-107a. The majority believed that the penalties imposed on Brentwood did not further the goal of protecting student athletes from exploitation, because all the eighth graders who were contacted by letter and telephone had agreed to attend Brentwood and were informed that attendance at spring practice was optional. *Id.* at 102a-103a. The majority also believed that the penalties did not further the goal of keeping high school athletics subordinate to academics, because, in addition to the information about spring football practice, Brentwood had provided incoming students with a variety of information about academics and other activities. *Id.* at 103a-106a.[2]

b. Judge Rogers dissented in relevant part. Pet. App. 131a-147a. In his view, Brentwood waived its right to engage in the speech at issue in exchange for membership in TSSAA and the waiver was not an "unconstitutional condition" of membership, because it was related to Brentwood's participation in the athletic association and did not extend to speech on a matter of public concern. *Id.* at 133a-139a. That theory had not been addressed in the court of appeals' opinion on remand from this Court and thus, the dissent believed, it was not foreclosed by the earlier opinion. *Id.* at 139a-140a. Judge Rogers also believed that the recruiting rule was narrowly tailored to further substantial governmental interests and that there was therefore no First Amendment violation even under the stan-

[2] The court of appeals majority also affirmed the district court's procedural due process holding, but it reversed the district court's substantive due process holding. Pet. App. 108a-120a.

dard applied by the court of appeals majority. *Id.* at 140a-147a. In the dissent's view, "TSSAA is not required to demonstrate that each time it enforces the anti-recruiting rule[] it is stamping out the exploitation of student athletes or the bending of academics to the will of athletics"; it is sufficient that, "in the aggregate," the conduct prohibited by the rule has "the potential" to have such an effect. *Id.* at 144a.

SUMMARY OF ARGUMENT

The court of appeals fundamentally misconceived and misapplied the First Amendment principles that control when the government restricts the speech of those who participate in a voluntary government program or enter into a contractual relationship with the government.

A. The court of appeals erred in applying a standard of "intermediate scrutiny" in reviewing the restriction on speech at issue here. That standard applies when the government acts in its traditional sovereign capacity, regulating the speech of the citizenry at large. Because TSSAA does not act in that capacity, Brentwood's challenge to the recruiting rule should have been reviewed under the substantially more deferential standard applicable when the government acts with respect to those who choose to participate in government programs or to contract with the government. When reviewed in that light, the restriction at issue is plainly constitutional.

The schools that have joined TSSAA have done so voluntarily, to obtain the benefits that membership provides, including access to athletic leagues. Under this Court's decisions, TSSAA is permitted to place restrictions on the speech of program participants, as long as the restrictions are reasonable in light of the program's purposes. See, *e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173 (1991); *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985). The recruiting rule easily satisfies that standard. Prohibiting "undue influence"

in recruiting, including a coach's contact with students not enrolled at the school, furthers TSSAA's legitimate goals of keeping athletics subordinate to academics, preventing the exploitation of student athletes, and fostering a level playing field among member schools.

If Brentwood's challenge to the recruiting rule is not reviewed under a reasonableness standard, it should at most be reviewed using the balancing test of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). That test applies when the government restricts the speech of an independent contractor. *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 676 (1996). Because the relationship between TSSAA and its member schools is likewise contractual, the *Pickering* test represents the most demanding standard that could be rationally applied in this context. Under that test, the interests of the contractor "as a citizen, in commenting upon matters of public concern," are balanced against the interests of the State "in promoting the efficiency of the public services it performs." *Umbehr*, 518 U.S. at 676 (quoting *Pickering*, 391 U.S. at 568). Brentwood cannot establish a First Amendment violation under that standard, because its recruiting does not involve speech by a citizen on a matter of public concern and because, even if it did, Brentwood's interest in recruiting players for its teams would be outweighed by the TSSAA interests described above.

B. Not only did the court of appeals err in adopting a standard of "intermediate scrutiny," but it also misapplied that standard in two different ways. First, the court erred in requiring record "evidence" to establish that TSSAA's interest in competitive equity is "substantial." This Court's decisions make clear that the substantiality of a governmental interest is often a matter of judgment and common sense rather than evidence, see, *e.g.*, *Ward* v. *Rock Against Racism*, 491 U.S. 781, 796 (1989); *City Council* v. *Taxpayers for Vin-*

cent, 466 U.S. 789, 808 (1984); *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 652-653 (1981), and that is true of competitive equity in high school athletics. Second, the court erred in concluding that Brentwood's as-applied challenge required TSSAA to justify its recruiting rule, not just as an appropriate "time, place, or manner" restriction, but as fully serving all the rule's purposes in this particular application. That is not TSSAA's burden. TSSAA is "entitled to protect its interest[s]" by applying the rule to "the general circumstances" of recruiting, and the rule need not fully vindicate all its underlying purposes in every application. *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 431 (1993).

ARGUMENT

THE COURT OF APPEALS MISCONSTRUED AND MISAPLIED THE FIRST AMENDMENT PRINCIPLES GOVERNING STATE ACTION IN THIS CONTEXT

In deciding Brentwood's First Amendment claim, the court of appeals applied a standard of "intermediate scrutiny," which is applicable to a "content-neutral" regulation of the "time, place, or manner" of speech. Pet. App. 96a-97a. That standard is out of place here, because it presumes that the State is regulating the citizenry at large in its sovereign capacity, rather than regulating those—like Brentwood—that voluntarily participate in a government program or contract with the government. The restriction on speech at issue is not aimed at the public at large, but only at those schools that choose to join TSSAA. The correct First Amendment standard is thus substantially more deferential, and it is easily satisfied here. Even under the heightened "intermediate scrutiny" standard applied by the court of appeals, however, there was no violation of Brentwood's First Amendment rights. In holding otherwise, the court of appeals misapplied

the law governing conventional "time, place, or manner" restrictions.

A. TSSAA's Recruiting Rule Should Have Been Reviewed And Upheld Under The Deferential Standard Applicable To Program Participants Or Contractors

TSSAA, a state actor by virtue of this Court's decision in *Brentwood I*, regulates athletic competition among high schools that choose to become members of the association. To further its goals, TSSAA has placed certain restrictions on the speech in which member schools (and their employees and students) may engage, including the prohibition on the use of "undue influence" in recruiting at issue here. No precedent of this Court directly addresses the degree of scrutiny to which restrictions on speech should be subjected in this precise context. Established First Amendment principles point to the conclusion, however, that the restrictions should be reviewed deferentially.

Under this Court's First Amendment jurisprudence, "the role of government as sovereign is subject to more stringent limitations than is the role of government as employer, property owner, or educator." *Board of Educ.* v. *Pico*, 457 U.S. 853, 920 (1982) (Rehnquist, J., dissenting). The same is true when the government acts in other non-sovereign capacities, such as contractor, funder, or program administrator.

For example, "[i]t is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when 'the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage [its] internal operation[s].'" *United States* v. *Kokinda*, 497 U.S. 720, 725 (1990) (plurality opinion) (quoting *Cafeteria & Rest. Workers* v. *McElroy*, 367 U.S. 886, 896 (1961)) (brackets in original); accord *International Soc'y for Krishna Consciousness, Inc.*

v. *Lee*, 505 U.S. 672, 678 (1992). This Court has also recognized that the government has "a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large." *Waters* v. *Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion); accord, *e.g.*, *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam). Likewise, whereas a strong justification is ordinarily required when the government "exercise[s] sovereign power against * * * a citizen in response to his * * * speech," deference is due to the government's "reasonable assessments of its interests" when it "exercise[s] contractual power." *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 678 (1996). Finally, the government is permitted to "allocate * * * funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *NEA* v. *Finley*, 524 U.S. 569, 587-588 (1998).

In subjecting the speech at issue here to "intermediate scrutiny," the court of appeals did not quarrel with the proposition that restrictions on speech are generally reviewed deferentially when the government does not act in a sovereign capacity. Instead, the court concluded that TSSAA *does* act in a sovereign capacity, because, as the court of appeals put it, TSSAA functions as a "regulator." Pet. App. 94a-95a. That conclusion is mistaken. To the extent that TSSAA exercises "regulatory authority" (*id.* at 89a), it does so only over the schools that have voluntarily chosen to become members of the association; it exercises no authority over the general public. TSSAA's "regulation" of member schools is no more an exercise of sovereign authority than a government employer's "regulation" of its employees, and the latter, as the court of appeals recognized (*id.* at 95a), is indisputably *not* an exercise of sovereign authority. See, *e.g.*, *United States* v. *National Treasury Employees Union*, 513 U.S. 454, 475 (1995) (distinguishing between government's "regulation" of

"expressive activity" of federal employees and government's "direct regulation" of "communication by private entities"); *Waters*, 511 U.S. at 671 (plurality opinion) (distinguishing between "regulating the speech of [government] employees" and "regulating the speech of the public at large"). The court of appeals was also mistaken in its belief that TSSAA's recruiting rule is "analogous" to "zoning ordinances and limitations on noise, posting of signs, and distribution of religious literature." Pet. App. 89a. Those are classic sovereign functions, reflecting the exercise of regulatory authority over the citizenry at large.[3]

If Tennessee or one of its agencies had enacted a statute or regulation that barred all private high schools in the State (and their agents) from exercising "undue influence" in recruiting student athletes, on pain of fine or imprisonment, the law would be subject to the more rigorous First Amendment scrutiny reserved for restrictions aimed at the public at large—although even then, depending on the precise nature of the law, it might be more properly analyzed as a regulation of conduct that incidentally takes the form of speech (such as a prohibition on insider trading or antitrust conspiracies) than as a restriction on speech as such. But, in any event, that is not the situation here. The recruiting rule applies only to schools that choose to obtain the benefits provided by TSSAA by becoming members of the association, and compliance with the rule is merely a condition of membership. The relationship between Brentwood and TSSAA, therefore, is not the relationship between citizen and sovereign. Although the

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[3] The court of appeals also believed that the applicability of the "intermediate scrutiny" standard was the law of the case, because that standard had been adopted in the court of appeals' decision on remand from this Court. Pet. App. 88a-91a. But "a court of appeals' adherence to the law of the case" obviously "cannot insulate an issue from this Court's review." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988).

arrangement is in some respects *sui generis*, it is best understood as the relationship between program participant and program administrator or between parties to a contract. Under either view, the restrictions that TSSAA has placed on the speech of member schools must be reviewed deferentially, and the restriction at issue here does not offend the First Amendment.

1. Brentwood is a voluntary participant in a program administered by TSSAA

a. TSSAA administers a program in which member schools voluntarily participate, so as to obtain the benefits provided by the program, including access to athletic leagues. See *Brentwood I*, 531 U.S. at 291; Pet. App. 79a. This Court's cases teach that, unlike laws that regulate the public at large, rules that govern a voluntary program that provides participants certain advantages subject to certain conditions may limit the speech of participants, as long as the rules are reasonable in light of the program's purposes.

In *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985), for example, the Court held that the government did not violate the First Amendment by excluding legal-defense and political-advocacy organizations from participation in the Combined Federal Campaign (CFC), a charity drive directed at federal employees. The Court reasoned that the CFC was a "nonpublic forum," *id.* at 806; that, under this Court's decisions, control over access to a nonpublic forum may be based on subject matter and speaker identity as long as the distinctions drawn are "reasonable in light of the purpose served by the forum" (and viewpoint-neutral), *ibid.* (citing *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)); and that it was reasonable for the government to exclude the speakers in question, because they would "disrupt" the fund-raising program and

"hinder its effectiveness for its intended purpose," *id.* at 811. Under the Court's "forum analysis," *id.* at 800, the program at issue in *Cornelius* was deemed property that was not a public forum and the government was deemed to be acting, not as sovereign, regulating the speech of the citizenry, but simply as the owner of the property. In that circumstance, the Court made clear, restrictions on the speech of those permitted to use the property are reviewed deferentially, because "the Government, 'no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" *Ibid.* (quoting *Greer* v. *Spock*, 424 U.S. 828, 836 (1976)).

Similarly, in *Rust* v. *Sullivan*, 500 U.S. 173 (1991), the Court rejected a First Amendment challenge to regulations prohibiting entities that receive Title X grants for the operation of family-planning projects from engaging in abortion counseling. The Court held that, within "broad[] limits," when "the Government appropriates public funds to establish a program," it is "entitled to define the limits of that program" and to prohibit certain speech "to ensure that the limits of the federal program are observed." *Id.* at 193-194. Distinguishing between the government's sovereign and non-sovereign functions, the Court explained that the case involved, not "a general law singling out a disfavored group on the basis of speech," but rather a "refus[al] to fund activities, including speech, which are specifically excluded from the scope of the project funded." *Id.* at 194-195. The Court noted that a recipient of funds "is in no way compelled to operate a Title X project" and may "avoid the force of the regulations * * * simply [by] declin[ing] the subsidy." *Id.* at 199 n.5. The Court also indicated that the result would have been different if the program had involved property "traditionally open to the public for expressive activity" or "expressly dedicated to speech activity," *id.* at 200 (quoting *Kokinda*, 497

U.S. at 726), thereby suggesting that, as in *Cornelius*, the program at issue could be viewed as a nonpublic forum.[4]

The program at issue here cannot be subjected to any more rigorous scrutiny than the programs in *Cornelius* and *Rust*. In *Cornelius*, charities could participate in the CFC as long as they abided by applicable rules, including the prohibition on legal-defense and political-advocacy activities. In *Rust*, entities could receive grants to operate family-planning projects as long as they abided by applicable rules, including the prohibition on abortion counseling. And in this case, high schools may become members of an athletic association as long as they abide by applicable rules, including the prohibition on the use of "undue influence" in recruiting. In those cases, as in this one, the government provided a benefit to voluntary participants in a government-sponsored program and, as a condition of participation, restricted the participants' ability to engage in speech that the government deemed inconsistent with the program's purposes. In those

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[4] The principle applied in *Rust* has also been applied to other types of government funding. See *United States* v. *American Library Ass'n*, 539 U.S. 194, 212 (2003) (plurality opinion) ("Especially because public libraries have traditionally excluded pornographic material from their other collections, Congress could reasonably impose a parallel limitation on its Internet assistance programs. As the use of filtering software helps to carry out these programs, it is a permissible condition under *Rust*."); *Finley*, 524 U.S. at 587-588 (funding for the arts). And *Rust* itself relied on the holding of *Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983), that "Congress could, in the exercise of its spending power, reasonably refuse to subsidize the lobbying activities of tax-exempt charitable organizations by prohibiting such organizations from using tax-deductible contributions to support their lobbying efforts." *Rust*, 500 U.S. at 197. See also *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984) ("Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept."); cf. *Rumsfeld* v. *FAIR*, 126 S. Ct. 1297, 1307 (2006) (declining to "determine when a condition placed on university funding goes beyond the 'reasonable' choice offered in *Grove City*").

cases, the limitation on speech was reviewed, at most, for reasonableness, and there is no reason to subject the state action here to any higher standard.

Indeed, while the federal government's interest is primarily directed at ensuring that analogous government programs that involve voluntary arrangements are not subjected to the same level of scrutiny as direct regulations imposed by the government in its sovereign capacity, it is not clear that the rule at issue here merits even the kind of scrutiny employed in *Cornelius* and *Rust*. The voluntary nature of the arrangement, the rule's focus on limiting conduct as opposed to speech as such, and the essentially arbitrary nature of rules designed to preserve a level playing field all combine to make First Amendment concerns largely misplaced. To be sure, as a state actor, TSSAA could not impose non-germane restrictions on speech, but its decision to limit recruiting and restrict a coach's contact with students not enrolled at the school appears plainly germane and does not raise any obvious First Amendment concern. Beyond ensuring that the rule does not restrict non-germane speech or discriminate based on viewpoint, it is hard to imagine that detailed scrutiny of recruiting limits to level the athletic playing field is an enterprise commanded by the First Amendment. Cf. *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 700 (2001) (Scalia, J., dissenting). In all events, the court of appeals erred in applying scrutiny substantially more rigorous than that employed in *Cornelius* and *Rust*.

b. The court of appeals did not discuss this Court's decision in *Cornelius*. Nor did it consider the possibility that a deferential standard of review was warranted because TSSAA is a nonpublic forum (or at least analogous to one), and thus the very opposite of a public forum, one of the legal contexts in which the "intermediate scrutiny" standard adopted by the court of appeals is most frequently applied (when the restric-

tion at issue is content-neutral), see, *e.g.*, *Thomas* v. *Chicago Park Dist.*, 534 U.S. 316, 322-323 & n.3 (2002); *Hill* v. *Colorado*, 530 U.S. 703, 719-730 (2000). The court of appeals did consider the possibility that this Court's decision in *Rust* supports a deferential standard of review. But it rejected that possibility, believing *Rust* inapposite because it involved a "funding program" and "government speech." Pet. App. 94a. Neither of those facts distinguishes *Rust* from this case.

As to the first asserted distinction: In deciding what level of First Amendment scrutiny is appropriate, there is no basis for distinguishing a cash "subsidy" (Pet. App. 93a) from other optional government benefits. In its non-sovereign capacity, the government confers a variety of benefits—not only "subsidies," but also (for example) salaries for "government employees," "tax exemptions," and the "use[] of public facilities." *Umbehr*, 518 U.S. at 680; accord, *e.g.*, *Finley*, 524 U.S. at 586. Indeed, the Court has suggested that *any* government benefit can be viewed as a form of "subsidy." See *Rust*, 500 U.S. at 200 (describing "Government-owned property" as a type of "Government 'subsidy'"); *Regan* v. *Taxation with Representation*, 461 U.S. 540, 544 (1983) (describing "tax exemptions and tax deductibility" as "a form of subsidy"); see also *Los Angeles Police Dep't* v. *United Reporting Publ'g Corp.*, 528 U.S. 32, 43 (1999) (Ginsburg, J., concurring) (describing provision of information about arrestees as "a kind of subsidy"). In this case, the benefits include "access to TSSAA leagues and tournaments" and "TSSAA's enforcement of its rules against competitors." Pet. App. 135a (Rogers, J., dissenting). There is no reason why an agreement to abide by the same rules, even if they incidentally restrict speech as a condition of those benefits, should be reviewed any less deferentially than restrictions on speech as a condition of the type of subsidy at issue in *Rust*.

As to the second asserted distinction: The contention that this Court's holding in *Rust* depended on the fact that "the government in that case was itself engaging in speech," Pet. App. 94a, was rejected by a plurality of this Court in *United States* v. *American Library Ass'n*, 539 U.S. 194, 213 n.7 (2003). The plurality characterized that assertion as a "misread[ing] [of this Court's] cases discussing *Rust*," *ibid.*, and explained that *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533 (2001), the case on which the court of appeals relied here (Pet. App. 94a), "held only" that *Rust* is inapplicable "when the [government] does not itself speak or subsidize transmittal of a message it favors *but instead expends funds to encourage a diversity of views from private speakers*," *American Library Ass'n*, 539 U.S. at 213 n.7 (plurality opinion) (quoting *Velazquez*, 531 U.S. at 542, in turn quoting *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995)) (brackets in original). The program at issue here was not established to encourage a diversity of views from private speakers any more than the program at issue in *Rust*.

c. The recruiting rule challenged by Brentwood prohibits "[t]he use of undue influence" on a student, or on the student's parents or guardians, "to secure or to retain [the] student for athletic purposes." J.A. 181. TSSAA has identified three reasons for the enactment of the rule: to keep high school athletics subordinate to academics; to protect student athletes from exploitation; and to foster a level playing field among the member schools. Pet. App. 97a. In agreement with the district court, the court of appeals held that all three of those justifications were legitimate (and that the first two were substantial as well as legitimate). *Id.* at 97a-100a. In light of those purposes, a rule prohibiting the use of "undue influence" in recruiting students to play on high school athletic teams is self-evidently a reasonable one, even if it might not be "the most reasonable or the only reasonable" rule.

Cornelius, 473 U.S. at 808. Indeed, setting reasonable parameters for recruiting serves many of the same purposes as setting parameters for field conditions, not to mention the length of games.

In deciding Brentwood's First Amendment challenge under a standard of "intermediate scrutiny," the court of appeals considered whether the justifications for the recruiting rule were furthered by its enforcement in this particular case. Pet. App. 102a-107a. As we explain in our discussion of the court of appeals' application of the intermediate-scrutiny standard, see pp. 27-30, *infra*, Brentwood may be able to bring an as-applied challenge to a broad *category* of conduct covered by the recruiting rule, but it cannot challenge the rule as applied only to *itself*. If that is true of the intermediate-scrutiny standard, it is *a fortiori* true of the more deferential reasonableness standard. And the recruiting rule is reasonable as applied to the broad category of conduct at issue here—*i.e.*, a coach's contact with students not yet enrolled at the school. Pet. App. 85a; see J.A. 181-185.

2. Brentwood has a contractual relationship with TSSAA

a. As the court of appeals recognized (Pet. App. 96a), the relationship between TSSAA and its member schools is contractual. "Any private or public secondary school may join the TSSAA by signing a contract agreeing to comply with its rules and decisions." *Brentwood I*, 531 U.S. at 306 (Thomas, J., dissenting). In *Umbehr*, *supra*, this Court held that, when the government restricts the speech of an independent contractor, the applicable First Amendment standard is the deferential balancing test of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), which governs First Amendment challenges by government employees. Under that test, which reflects a recognition that "review of government employment

decisions must rest on different principles than review of speech restraints imposed by the government as sovereign," *Waters*, 511 U.S. at 674 (plurality opinion), "the interests of the [employee], as a citizen, in commenting upon matters of public concern" are balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," *Umbehr*, 518 U.S. at 676 (quoting *Pickering*, 391 U.S. at 568) (brackets in original). Brentwood's challenge to TSSAA's recruiting rule should not be subject to any standard more demanding than the *Pickering* balancing test.

The contractual relationship between a school and an athletic association is analogous to the relationship between an employee or independent contractor and the agency for which the employee or contractor works. Likewise, requiring a school that wishes to be a member of an athletic association to abide by the association's rules, including those that restrict speech, is analogous to requiring a person or entity that wishes to work for a government agency to abide by the agency's rules, including those that restrict speech. Because the Court has recognized the need for more deferential review of the government's actions in the latter context, at most a similarly deferential standard should apply in this context (if the reasonableness standard does not). As one court observed in holding that the test applies in the circumstances present here, an interscholastic athletic association "exercises no sovereign power" over a member school, which has merely "a contractual relationship" with the association; the school is "only bound by the Anti-Recruiting Rule because [the school] voluntarily applied for membership in the [association]"; and the school "can free itself from the proscriptions of the Anti-Recruiting Rule at any time by withdrawing from membership." *Rottmann* v. *Pennsylvania Interscholastic Athletic Ass'n*, 349 F. Supp. 2d 922, 930 (W.D. Pa. 2004).

The Court's decision in *Snepp*, *supra*, underscores the deferential standard of review that the Court has applied to speech restrictions voluntarily accepted by those who contract with the government. In that case, an employee of the Central Intelligence Agency (CIA) "voluntarily signed [an] agreement that expressly obligated him to submit any proposed publication for prior review." 444 U.S. at 509 n.3. The Court rejected the employee's First Amendment claim that his agreement was "unenforceable as a prior restraint on protected speech." *Ibid.* It reasoned that the agreement was an "entirely appropriate" and "reasonable means" for protecting intelligence sources and methods and thus furthering the CIA's mission. *Ibid.* (quoting court of appeals' opinion).

b. The court of appeals believed that *Umbehr* does not support application of a deferential standard of review, both because this case does not involve independent contractors (Pet. App. 91a-92a) and because, in the court of appeals' view, the standard adopted in *Umbehr* is in any event consistent with "intermediate scrutiny" (*id.* at 93a). The second asserted reason is mistaken, and the first, although correct, provides no basis for rejecting the *Pickering* balancing test.

As to the court of appeals' second reason: The intermediate-scrutiny standard, which requires, among other things, that the challenged regulation be "narrowly tailored" to further "substantial governmental interests," is more demanding than the *Pickering* balancing test. To begin with, only a limited category of speech is even presumptively entitled to First Amendment protection under the balancing test: speech expressed "as a citizen," upon "matters of public concern." *Pickering*, 391 U.S. at 568. Regardless of the strength of the government's interests in limiting it, speech enjoys no constitutional protection under *Pickering* if it is not expressed as a citizen, see *Garcetti* v. *Ceballos*, 126 S. Ct. 1951, 1957-1962 (2006), or does not address a matter of public concern,

see, *e.g.*, *City of San Diego* v. *Roe*, 543 U.S. 77, 82-85 (2004) (per curiam). And even speech that satisfies those two requirements can permissibly be restricted if the government's interests in preventing the disruption of public services outweigh the speaker's interests in the speech. See, *e.g.*, *Waters*, 511 U.S. at 680-681 (plurality opinion). Substantial deference, moreover, is accorded to the government's view of its interests. See, *e.g.*, *Umbehr*, 518 U.S. at 677-678, 685. In all of these respects, the *Pickering* standard, which reflects "a deferentially administered requirement that the government not unreasonably terminate its commercial relationships on the basis of speech," *id.* at 684, is far less stringent than the intermediate-scrutiny standard adopted by the court of appeals. Moreover, because the recruiting rule is addressed to the conduct and speech of coaches as coaches, not as citizens, and is germane to the business of the athletic association and not directed to matters of broader public concern, it easily passes muster. See *infra*, pp. 23-25.

As to the court of appeals' first reason: Although a TSSAA member school is not the same *type* of contractor as was at issue in *Umbehr*, it is a contractor nonetheless, in that it receives a benefit from the government in exchange for consideration. Just as an independent contractor provides goods and services to a government agency in exchange for a fee, a member school makes its athletic teams available to TSSAA in exchange for access to leagues and tournaments. Each type of contractor thus has a relationship with the government that is not the relationship between citizen and sovereign. And that is the relevant characteristic as far as the appropriate level of First Amendment scrutiny is concerned.

In the employee and independent-contractor contexts, application of the *Pickering* balancing test is appropriate because, when the speech at issue does not address a matter of public concern, government officials must have "wide latitude

in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick* v. *Myers*, 461 U.S. 138, 146 (1983); accord *Umbehr*, 518 U.S. at 677-678. And even when the speech does address a matter of public concern, an official must be able to take action when "the functioning of his office [i]s endangered." *Connick*, 461 U.S. at 153; accord *Umbehr*, 518 U.S. at 674. The same concerns *a fortiori* justify application of an appropriately deferential test here. "The operation of a sports league demands speech limits that are germane to the agreed-upon venture no less," and likely more, "than does employment" or the relationship with independent contractors. Pet. App. 138a (Rogers, J., dissenting). In particular, when a member school or its agents "engage in inappropriate activity, such as repeated unsportsmanlike conduct, or cheating, or recruiting," the athletic association "needs to be free to sanction the wrongdoer in order to maintain the quality of its programs and to serve the purposes for which it was created." *Rottmann*, 349 F. Supp. 2d at 930. If anything, therefore, the differences between an employee or independent contractor and the type of contractor at issue here call for *more* deferential review in this context. And a "proper application of the *Pickering* balancing test can accommodate the differences." *Umbehr*, 518 U.S. at 678.

c. For three independent reasons, Brentwood cannot establish a violation of the First Amendment under the *Pickering* test. First, the speech by Brentwood's football coach was expressed, not "as a citizen," but as the coach of a team that competes in a TSSAA league. The coach's letters and telephone calls to the students and their families were thus unlike "the expressions made by the speaker in *Pickering*," for example, "whose letter to the newspaper had no official significance and bore similarities to letters submit-

ted by numerous citizens every day." *Garcetti*, 126 S. Ct. at 1960.

Second, even if the speech at issue can be characterized as "citizen" speech, both the general type of speech prohibited by the recruiting rule—the use of "undue influence" to secure or retain a student for athletic purposes—and the particular speech in which Brentwood engaged—a coach's contact with students who were not yet enrolled at the school—do not "touch upon any matter of public concern." Pet. App. 138a (Rogers, J., dissenting). On the contrary, the speech, "by definition," addresses a matter of purely *private* concern: an effort to persuade students to attend the speaker's school and play on his school's athletic teams. *Rottmann*, 349 F. Supp. 2d at 930. The speech is thus even further removed from a "public concern" than the speech at issue in *Connick*, *supra*, which was held not to address any matter of public concern even though it pertained to "the confidence and trust" that employees of a district attorney's office "possess[ed] in various supervisors," "the level of office morale," and "the need for a grievance committee." 461 U.S. at 148; cf. *Roe*, 543 U.S. at 84 (noting that, "even under the view expressed by the dissent in *Connick* * * *, the speech here would not come within the definition of a matter of public concern").

Third, even if the speech at issue could somehow be thought to be speech by a citizen on a matter of public concern, member schools' interest in the speech would be "greatly outweigh[ed]" by TSSAA's interest in restricting it. *Rottmann*, 349 F. Supp. 2d at 931. The use of "undue influence" in recruiting athletes in general, and a coach's contact with a student not yet enrolled in the school in particular, have the potential to "disrupt[]," "interfere[] with," and "undermin[e]," *Connick*, 461 U.S. at 151-152, the three core values that TSSAA sought to further by enacting the recruiting rule: keeping athletics subordinate to academics, protect-

ing student athletes from exploitation, and fostering a level playing field among member schools. And TSSAA's interest in preventing that result is considerably stronger than Brentwood's interest in "recruit[ing] standout eighth grade athletes." *Rottmann*, 349 F. Supp. 2d at 931.

This case differs from *National Treasury Employees Union*, *supra*, in which this Court stated that "the Government's burden is greater with respect to [a general] restriction on expression than with respect to an isolated disciplinary action," 513 U.S. at 468, and held that the government could not discharge that burden in seeking to justify a ban on the receipt of honoraria by federal employees. Unlike the speech covered by the honorarium ban, most of which "d[id] not involve the subject matter of Government employment," *id.* at 470, and was "wholly unrelated to the workplace," *id.* at 482 (O'Connor, J., concurring in the judgment in part), the speech prohibited by the recruiting rule is directly related to interscholastic athletic competition, the subject matter of the contractual relationship between TSSAA and member schools.

B. The Court Of Appeals Also Misapplied The "Intermediate Scrutiny" Standard

1. In applying "intermediate scrutiny," the court of appeals held that only two of the three proffered justifications for the recruiting rule were substantial governmental interests and that the rule, as applied to Brentwood, was not narrowly tailored to further either of them. Pet. App. 96a-107a. In so holding, the court misapplied both the "substantial governmental interest" and "narrow tailoring" elements of the standard governing challenges to "time, place, or manner" restrictions.

a. The court of appeals held that keeping athletics subordinate to academics and protecting student athletes from exploitation are substantial governmental interests but that

fostering a level playing field among member schools is not. Pet. App. 97a-100a. The basis for that holding was that TSSAA produced no "evidence" that its interest in competitive equity in interscholastic athletics is a "substantial" one. *Id.* at 100a. The determination of whether a particular governmental interest is "substantial," however, is ordinarily a matter of judgment and common sense rather than evidence. For example, the court of appeals required a showing of a "substantial governmental interest" under the "intermediate scrutiny" standard because it believed that the recruiting rule was "analogous" to "limitations on noise, posting of signs, and distribution of religious literature." *Id.* at 89a. Yet this Court did not demand any evidentiary showing in concluding that the government had a substantial interest in "protecting its citizens from unwelcome noise," *Ward* v. *Rock Against Racism*, 491 U.S. 781, 796 (1989) (quoting *City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 806 (1984)), "eliminating visual clutter," *Taxpayers for Vincent*, 466 U.S. at 808, or "the orderly movement and control of [the] assembly of persons" at the state fair at which the religious literature was distributed, *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650 (1981).

Nor did the court of appeals in this case rely on any record evidence in concluding that keeping athletics subordinate to academics is a substantial governmental interest. Pet. App. 22a, 97a. And the only evidence on which it relied in concluding that preventing the exploitation of students is a substantial interest, *id.* at 98a-99a, merely confirmed what would have been obvious without the evidence. It is an equally "obvious proposition," *id.* at 145a n.2 (Rogers, J., dissenting), that teenagers who play on teams that rarely win can easily become demoralized and lose interest in athletics, which can be a critical part of a child's education and development. Under these circumstances, TSSAA's interest in competitive equity is self-

evidently a substantial one, and the court of appeals erred in requiring record evidence to prove it.

b. The basis for the court of appeals' holding that the recruiting rule fails the "narrow tailoring" requirement was that enforcement of the rule *in this case* did not further either of the interests that the court found to be legitimate and substantial. Pet. App. 100a-107a. Thus, with respect to TSSAA's interest in preventing the exploitation of student athletes, the court reasoned that, because the students contacted by Brentwood's football coach had already signed enrollment contracts with the school and were informed that spring practice was optional, "neither students nor parents were exploited in theory or in fact." *Id.* at 103a (quoting district court's decision). And with respect to TSSAA's interest in keeping athletics subordinate to academics, the court reasoned that, because incoming students also received information from Brentwood about academics and other activities, the coach's letters and telephone calls did not have any effect on "the relative standing of academics and athletics at the school." *Id.* at 106a. In finding a First Amendment violation in this case, the court stated that "application of the recruiting rule to other schools communicating in similar ways to students" might *not* be unconstitutional, because, for example, "it is possible that letters and calls similar to the ones at issue here *would* be exploitative in a different context." *Id.* at 102a n.11 (emphasis added). The court of appeals' holding leaves no room for legitimate prophylactic rules and reflects a fundamental misunderstanding of the "narrow tailoring" requirement in cases presenting as-applied challenges to "time, place, or manner" restrictions.

This Court has squarely "rejected the * * * view that [an] 'as applied' challenge require[s] the State to show that [the plaintiff's] particular conduct in fact trenched on the interests that the regulation sought to protect." *United States*

v. *Edge Broad. Co.*, 509 U.S. 418, 431 (1993). The State is "entitled to protect its interest[s] by applying a prophylactic rule to th[e] circumstances [of the plaintiff's acts] generally"; it is not required "to go further and to prove that the state interests supporting the rule actually were advanced by applying the rule in [the plaintiff's] particular case." *Ibid.* Accordingly, while a plaintiff may be able to bring an as-applied "time, place, or manner" challenge to a "broad category" of conduct, he cannot challenge a regulation "as applied only to himself or his own acts." *Ibid.*; see, *e.g.*, *Edenfield* v. *Fane*, 507 U.S. 761, 763 (1993) (holding that a ban on solicitation by certified public accountants violates the First Amendment "as applied * * * in the business context").

Edge Broadcasting and *Edenfield*, the decisions cited above, are both commercial-speech cases, as is *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978), another case in which the same principle was applied, see *id.* at 462 (State need not demonstrate that "evils" regulation seeks to prevent are present in each case). As the Court observed in *Edge Broadcasting*, however, "the validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial speech context." 509 U.S. at 430; see *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 623 (1995) ("we engage in 'intermediate' scrutiny of restrictions on commercial speech"). The Court therefore relied on a "time, place, or manner" decision, *Ward*, *supra*, in holding that the validity of a restriction on speech is not to be judged "by the extent to which it furthers the Government's interest in an individual case." *Edge Broad.*, 509 U.S. at 430-431; see *Ward*, 491 U.S. at 801 ("the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case").

Other decisions of this Court, moreover, have applied the same principle in addressing as-applied challenges to "time, place, or manner" restrictions. See *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 296-297 (1984) ("the validity of this regulation need not be judged solely by reference to the demonstration at hand"); *Heffron*, 452 U.S. at 652 ("The justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to [the plaintiff]."). The decision on which the court of appeals relied (Pet. App. 107a n.15), *Taxpayers for Vincent*, *supra*, is not to the contrary. In rejecting an as-applied challenge to a ban on the posting of signs on public property, this Court did not hold that the interests supporting the ban were furthered in that particular case; it held that "the city's esthetic interests were * * * substantial" and that posted signs "by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.'" 466 U.S. at 807-808 (quoting *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 510 (1981) (plurality opinion)).

The dissenting judge in the court of appeals was therefore correct when he said that "TSSAA is not required to demonstrate that each time it enforces the anti-recruiting rule[] it is stamping out the exploitation of student athletes or the bending of academics to the will of athletics for the anti-recruiting rule[] to be valid." Pet. App. 144a (opinion of Rogers, J.). It is sufficient that the conduct prohibited by the rule, "in the aggregate," leads to "the exploitation of student athletes or the subordination of academics to athletics." *Ibid.* By holding that the purposes of the recruiting rule must be furthered in every case and that they were not furthered in this one, the court of appeals not only disregarded this Court's precedents on as-applied challenges to "time, place, or manner" restrictions; it effectively converted the recruiting rule into a standard (designed to avoid the exploitation of student athletes or

the subordination of academics to athletics) and found that the standard was not violated in this case. The First Amendment does not grant courts such authority.

2. If the court of appeals had properly applied intermediate scrutiny, the recruiting rule would have satisfied that standard. Of course, the court of appeals' more fundamental mistake was to apply intermediate scrutiny, as opposed to substantially more deferential review, in the first place. In either event, the decision below was erroneous and should be reversed.

CONCLUSION

The judgment of the court of appeals as to the First Amendment claim should be reversed.

Respectfully submitted.

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